No. 15-35

IN THE

Supreme Court of the United States

HOUSTON BAPTIST UNIVERSITY,
EAST TEXAS BAPTIST UNIVERSITY, AND
WESTMINSTER THEOLOGICAL SEMINARY,

Petitioners,

v.

SYLVIA MATHEWS BURWELL,
SECRETARY OF HEALTH & HUMAN SERVICES, ET AL.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

Brief of the Ethics and Religious Liberty Commission and the International Mission Board as *amici curiae* in support of Petitioners

MILES E. COLEMAN
Counsel of Record
JAY T. THOMPSON
Nelson Mullins Riley & Scarborough, LLP
1320 Main Street
Columbia, SC 29201
miles.coleman@nelsonmullins.com
(803) 799-2000

DEREK GAUBATZ
Int'l Mission Board
3806 Monument Avenue
Richmond, VA 23230
(800) 219-1575

Counsel for *Amici Curiae*

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. Christian doctrine and Southern Baptist belief require that faith govern every aspect of a Christian's life 3

II. Scripture and Southern Baptist doctrine teach that life begins at conception and therefore abortion is the taking of innocent human life and is a grave moral wrong 9

III. Christian doctrine and Southern Baptist teaching state it is a sin for a Christian to enable or aid another in doing what the Christian believes to be wrong 15

IV. Requiring Christians to choose between violating the Government's regulations or violating their sincerely held religious beliefs substantially burdens their exercise of religion 20

CONCLUSION 24

TABLE OF AUTHORITIES

Page

Cases

Attorney Gen. v. Desilets,
636 N.E.2d 233 (Mass. 1994) 17, 18

Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993) 22

Employment Div., Dept. of Human Resources v. Smith, 494 U.S. 872 (1990) 21

Gilardi v. U.S. Dept. of Health and Human Servs., 733 F.3d 1208 (D.C. Cir. 2013) 17

Hanna v. Secretary of the Army,
513 F.3d 4 (1st Cir. 2008)..... 16

Hobby Lobby Stores, Inc. v. Sebelius,
723 F.3d 1114 (10th Cir. 2013) 17, 18, 22

Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694, 713 (2012)..... 4

Korte v. Sebelius,
735 F.3d 654 (7th Cir. 2013) 6

O'Bryan v. Bureau of Prisons,
349 F.3d 399 (7th Cir. 2003) 21

Sherbert v. Verner,
374 U.S. 398 (1963) 21, 23

Spencer v. World Vision, Inc.,
633 F.3d 723 (9th Cir. 2011) 4

State by Cooper v. French,
460 N.W.2d 2 (Minn. 1990) 17

Thomas v. Anchorage Human Rights Comm'n, 165 F.3d 692 (9th Cir. 1999)..... 17

Thomas v. Review Bd. of Indiana Empl. Sec. Div., 450 U.S. 707 (1981)..... 20–23

United States v. Lee,
455 U.S. 252 (1982) 22

Wisconsin v. Yoder,
406 U.S. 205 (1972) 21

Rules

45 C.F.R. § 147.131 (2013)..... 23

78 Fed. Reg. 39870 (July 2, 2013) 23

Statutes

42 U.S.C. § 238n 17

42 U.S.C. § 300a-7..... 17

42 U.S.C. § 2000bb-1(a) 20

42 U.S.C. § 2000bb-1(b) 20

42 U.S.C. § 2000bb(b)(1) 21

42 U.S.C. § 2000cc-5(7)(A) 22

50 U.S.C. App. § 456(j) 16

Other Authorities

Aaron Schwabach, *Thomas Jefferson, Slavery, and Slaves*, 33 T. Jefferson L. Rev. 1 (2010) 7

The Baptist Faith & Message 2000, Article XIII 4

Carl F.H. Henry, *Has Democracy Had Its Day?* (1996) 14

Carl F.H. Henry, *Twighlight of a Great Civilization* (1988) 14

ERLC Letter to Congress on No Taxpayer Funding for Abortion Act, January 27, 2014 14

Isaac Watts, *The Poetical Works of Isaac Watts, Vol. IV* (1782) 4

John Calvin, *Commentaries on the Last Four Books of Moses*, Vol. 3 (tr. Charles Bingham, 1852) 13

John Foxe, *Acts and Monuments* (1563) 6

John Leland, *The Right of Conscience Inalienable* (1791) 8

Justo L Gonzalez, *The Story of Christianity*, Vol. 1 (1984) 7

The Large Catechism by Martin Luther (1529), reprinted in *Triglot Concordia: The Symbolical Books of the Ev. Lutheran Church* (1921) 16

Mark L. Rienzi, *The Constitutional Right Not to Kill*, 62 Emory L.J. 121 (2012) 17

Mark S. Scarberry, *John Leland and James Madison: Religious Influence on the Ratification of the Constitution and on the Proposal of the Bill of Rights*, 113 Penn St. L. Rev. 733 (2009) 8

Martin Luther, *Luther's Works, Vol. 4: Lectures on Genesis Chapters 21-25* (tr. Jaroslav Pelikan, 1999) 13

Martin Luther, *Luther's Works, Vol. 33: Career of the Reformer III* (1972) 7

R. Albert Mohler, Jr., *"Abortion is as American as Apple Pie"—The Culture of Death Finds a Voice* 14

R. Albert Mohler, Jr., *"I Feel Super Great About Having an Abortion"—The Culture of Death Goes Viral* 14

R. Albert Mohler, Jr., *So What if Abortion Ends a Life? Rare Candor from the Culture of Death* 14

Religious Freedom Restoration Act 2, 20–22

Thomas Vincent, *An Explanation of the Assembly's Shorter Catechism* (1806) 16

Scriptures

1 Corinthians 10:31 5

1 Corinthians 8:9-13 15

Colossians 3:17 5

Colossians 3:23-24 5

Daniel 3:1-30 ..... 6, 7

Ecclesiastes 3:1-13 5

Galatians 6:10 11

Genesis 1:27 10

James 1:27 8

James 2:17 6

Jeremiah 1:4-5 10

Luke 1:39-44 10

Mark 12:17 19

Matthew 18:6 15

Matthew. 25:37-40 8

Matthew 28:18-20 1

Matthew 28:19 8

Proverbs 31:8 11

Proverbs 6:16-17 10

Psalm 106 10

Psalm 139:13-16 10

Psalm 24:1 3

Romans 12:1 6

Romans 13:3-7 19

Romans 14:13-14 15

INTEREST OF *AMICI CURIAE*[1]

The Ethics and Religious Liberty Commission ("ERLC") is an entity of the Southern Baptist Convention ("SBC"), which is the nation's largest Protestant denomination, with over 46,000 autonomous churches and 16 million members. The ERLC is dedicated to engaging the culture with the gospel of Jesus Christ and speaking to issues in the public square for the protection of religious liberty and human flourishing. The ERLC is charged by the SBC with addressing public policy affecting such issues as freedom of speech, religious freedom, marriage and family, and the sanctity of human life. The ERLC fears the government mandate at issue in this suit threatens the Constitution's guarantee of freedom from governmental interference in matters of faith, a crucial protection upon which SBC members and adherents of other faiths depend as they follow the dictates of their consciences in the practice of their faith.

The International Mission Board ("IMB") is an entity of the SBC dedicated to taking the gospel of Jesus Christ to all nations and peoples in fulfillment of the Great Commission found in Matthew 28:18-20. The IMB employs more than 5,000 Christian workers to achieve its vision of seeing a multitude of every people, tribe, and tongue from around the world come to worship and exalt Jesus Christ as Lord and Savior.

---

[1] The parties' counsel were timely notified of and consented to the filing of this brief. Neither a party nor its counsel authored this brief in whole or in part. No person or entity, other than the *amici curiae* or their counsel made a monetary contribution to the preparation and submission of this brief.

SUMMARY OF ARGUMENT

Requiring a Christian—specifically, Southern Baptist individuals or entities—to choose between violating the Government's regulations or violating their sincerely held religious beliefs substantially burdens their exercise of religion in violation of the Religious Freedom Restoration Act and the First Amendment to the United States Constitution. A fundamental aspect of Christian doctrine is its requirement that faith must govern every aspect of a Christian's life. As a matter of scriptural command, conscience, Protestant tradition, and Southern Baptist teaching, the exercise of the Christian religion must guide and determine a Christian's decisions, words, and deeds in every facet of life, including seemingly "secular" matters like the administration of insurance and the provision of certain drugs and devices.

Because of the holistic nature of the Christian faith, Baptists throughout American history have discerned a spiritual obligation to interact with and influence the culture outside the church doors. This has historically included providing for and protecting the oppressed or defenseless, including the protection of innocent and unborn human life. Southern Baptists have spoken clearly in opposition to abortion and in support of their belief that life begins at conception, beliefs that are grounded in the words of Holy Scripture.

In light of the broad scope of the Christian faith and the Southern Baptist theological opposition to abortion, the Petitioners cannot, as a matter of doctrine and conscience, distribute abortion-inducing drugs and devices directly or indirectly by

authorizing, obligating, or incentivizing a third party—and particularly their own third-party administrators—to provide such drugs and devices to others. Scripture and Southern Baptist belief prohibit not only direct and personal wrongdoing, but also the enabling, authorizing, incentivizing, or aiding of another in doing what the Christian believes to be sin. Christian doctrine teaches that believers who knowingly aid or abet another's wrongdoing have themselves done wrong. Accordingly, a statute or regulation requiring a Southern Baptist individual or ministry to be complicit in conduct that the Christian faith teaches is morally wrong forces that person or ministry into an impossible choice—to either violate conscience or violate the law—and imposes a substantial burden on the exercise of religion.

ARGUMENT

I. Christian doctrine and Southern Baptist belief require that faith govern every aspect of a Christian's life.

A fundamental aspect of Christianity is its requirement that the Christian faith govern all aspects of the believer's life. This teaching is drawn directly from the Holy Scripture and stems from the Christian belief that God's sovereignty extends over every area of human endeavor. *See, e.g., Psalm* 24:1 ("The earth is the Lord's and the fullness thereof, the world and those who dwell therein.").[2] In the words of the English theologian and poet Isaac Watts, God's

---

[2] All quotations of Scripture herein are taken from the Holy Bible, English Standard Version.

"love, so amazing, so divine, demands my life, my soul, my all." Isaac Watts, *The Poetical Works of Isaac Watts, Vol. IV* 173 (1782).

Accordingly, Christianity has never limited its reach merely to matters of theology and ceremonial observance. *See, e.g.*, *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 713 (2012) (Alito, J., concurring) (agreeing with the Court's unanimous opinion that the job duties of a Lutheran minister engaged in education "reflected a role in conveying the Church's message and carrying out its mission" and observing that "[r]eligious teachings cover the gamut from moral conduct to metaphysical truth."); *Spencer v. World Vision, Inc.*, 633 F.3d 723 (9th Cir. 2011) (per curiam) (finding a Christian humanitarian organization "'working with children, families and their communities worldwide to reach their full potential by tackling the causes of poverty and injustice'" was a religious activity); *see also* The Baptist Faith & Message 2000, Article XIII ("God is the source of all blessings, temporal and spiritual; all that we have and are we owe to Him. . . [Christians] are therefore under obligation to serve Him with their time, talents, and material possessions; and should recognize all these as entrusted to them to use for the glory of God and for helping others."), *available at* http://www.sbc.net/bfm2000/bfm2000.asp (last visited August 7, 2015).[3]

---

[3] The Baptist Faith and Message is the statement of faith of the Southern Baptist Convention and summarizes Southern Baptist beliefs in areas including the Bible and its authority, the nature of God, the spiritual condition of man, God's plan of grace and salvation, evangelism and missions, education, the Christian and social order, religious liberty, and the family.

Rather, Christianity teaches that one's faith influences even those areas of life that appear superficially unrelated to worship, prayer, or theology. *See, e.g., Colossians* 3:17 ("And whatever you do, in word or deed, do everything in the name of the Lord Jesus."). Indeed, Christianity teaches there is spiritual significance in *every* part of life, including seemingly mundane acts like eating, drinking, and working. *See 1 Corinthians* 10:31 ("So whether you eat or drink or whatever you do, do all for the glory of God."); *Colossians* 3:23-24 ("Whatever you do, work heartily, as to the Lord."); *Ecclesiastes* 3:1-13 (noting "[f]or everything there is a season, and a time for every matter under heaven" and that "everyone should eat and drink and take pleasure in all his toil—this is God's gift to man"). These holistic demands of Christianity require consistency in familial, business, and social relations and are not limited to sacerdotal, ecclesial, or ritual matters.

This integration of a Christian's entire life in relation to God is an outgrowth of the Christian gospel, which provides that God, completely righteous and without sin, by His infinite grace, justifies man who is by nature unrighteous and sinful. This cannot be accomplished by any work or merit by man to somehow achieve good standing with God, but instead is accomplished by and through the work of Jesus Christ's death on the cross. Thus, by faith alone in Christ alone, man is counted righteous by God.

This doctrinal requirement that a Christian must pursue all aspects of his or her life in obedience to Christ compels Christians to do more than give mere intellectual assent. The Christian faith requires not only belief, but also conduct, and this requirement

extends to every facet of the Christian's life. *See James* 2:17 ("So also faith by itself, if it does not have works, is dead."); *Romans* 12:1 (urging Christians, "in view of God's mercy," to devote their entire beings to Him as "true and proper worship"); *see also Korte v. Sebelius*, 735 F.3d 654, 681 (7th Cir. 2013) (noting that religious belief is not confined to the home and the house of worship because "[r]eligious people do not practice their faith in that compartmentalized way."); The Baptist Faith & Message 2000, Article XV ("All Christians are under obligation to seek to make the will of Christ supreme in our own lives and in human society. . . . Every Christian should seek to bring industry, government, and society as a whole under the sway of the principles of righteousness, truth, and brotherly love.").

Scripture and history are replete with instances in which Christian believers who were presented with a choice either to violate their consciences by complying with the state's demands or to face draconian penalties chose to maintain the integrity of their faith in every aspect of life and accept the consequences. *See generally* John Foxe, *Acts and Monuments* (1563) (recounting anecdotes of early Protestant martyrs). For example, the Old Testament Scripture recounts the story of three Hebrew men who refused to worship an image of Babylonian King Nebuchadnezzar, despite the threat of execution for noncompliance. *See Daniel* 3:1-30. Shadrach, Meshach, and Abednego were cast "into the burning fiery furnace" for refusing to worship the king's image. *Id.* Although the Babylonian government conceived the requirement of bowing down to the image as merely an act of political loyalty, the three

young men understood it as a requirement to violate their faith through idolatry. *Id.*

Similarly, the second-century Christian martyr Polycarp was willing to suffer death for refusing to state "Caesar is Lord." *See* Justo L Gonzalez, *The Story of Christianity*, Vol. 1, 43-44 (1984). To the Roman government, the law was merely a political issue, but to Polycarp, it was an issue of idolatry. Likewise, the Protestant reformer Martin Luther, when asked to recant his beliefs, famously stated to Emperor Charles V, "[M]y conscience is captive to the Word of God. I cannot and I will not recant anything, since it is neither safe nor right to go against conscience. May God help me. Amen." Martin Luther, *Luther's Works, Vol. 33: Career of the Reformer III* (1972).

Baptist history in America abounds with examples of the doctrinal connection between faith and practice, even when that faith compelled action that ran contrary to the social mores of the day. For example, Roger Williams—founder of the first Baptist church in America—founded the only colony to prohibit slavery and tolerate religious dissenters. *See* Aaron Schwabach, *Thomas Jefferson, Slavery, and Slaves*, 33 T. Jefferson L. Rev. 1, 14 n. 73 (2010) (noting that the colony of Rhode Island, under Williams' leadership, "prohibited slavery, tolerated Quakers and Jews, and endeavored to maintain peaceful relations with the Pequod Indians, who had been the victims of massacre and enslavement by the Massachusetts settlers"). Similarly, John Leland, a widely known Baptist minister in colonial Virginia, was a staunch abolitionist and a firm voice in support of religious liberty, free from government coercion and control:

> "Does a man upon entering into social compact surrender his conscience to that society to be controled by the laws thereof . . . ?" I judge not, for the following reasons:
>
> 1. Every man must give an account of himself to God, and therefore every man ought to be at liberty to serve God in that way that he can best reconcile it to his conscience. If government can answer for individuals at the day of judgment, let men be controled by it in religious matters; otherwise let men be free.

John Leland, *The Right of Conscience Inalienable* (1791), *available at* http://berkleycenter.georgetown.edu/resources/quotes/john-leland-the-right-of-conscience-inalienable-on-religion-as-a-matter-between-god-and-individuals (last visited August 7, 2015); *see also* Mark S. Scarberry, *John Leland and James Madison: Religious Influence on the Ratification of the Constitution and on the Proposal of the Bill of Rights*, 113 Penn St. L. Rev. 733 (2009).

In light of these Scriptural commands, Christian doctrine, and Baptist tradition, it is no surprise that the types of work done by Petitioners, *amici*, and related Southern Baptist organizations—*e.g.*, funding and organizing international missions, educating students and church members from a Christian perspective, and providing physical and spiritual care for orphans and widows—are, in fact, spiritual obligations that are ministerial and sacred in nature. *See, e.g.*, *Matthew*. 25:37-40; *Matthew* 28:19; *James* 1:27; *see also* The Baptist Faith and

Message 2000 Art. XII ("An adequate system of Christian education is necessary to a complete spiritual program for Christ's people."); The Baptist Faith and Message 2000 Art. XV ("We should work to provide for the orphaned, the needy, the abused, the aged, the helpless, and the sick."); SBC Resolution On Adoption and Orphan Care, 2009 ("[W]e encourage local churches to champion the evangelism of and ministry to orphans around the world."), *available at* http://www.sbc.net/resolutions/1194 (last visited August 7, 2015). In light of that spiritual duty, it is also not surprising that Petitioners refuse to quail before the government's demand to violate conscience or suffer government sanction.

In sum, because Christian doctrine requires that faith govern every aspect of a Christian's life and teaches that a Christian's conscience is captive to the word of God, Christians must act in accordance with their beliefs and in integrity of conscience in every aspect of life. Simply stated, the exercise of Christian faith must, as a matter of scriptural teaching, church tradition, and denominational doctrine, guide and determine a Christian's decisions, choices, words, and deeds, both in private and in every facet of life.

II. Scripture and Southern Baptist doctrine teach that life begins at conception and therefore abortion is the taking of innocent human life and is a grave moral wrong.

Southern Baptists have spoken clearly in opposition to abortion and in support of their belief that life begins at conception. These beliefs are grounded in the words of Holy Scripture, which teach that God's knowledge of, care for, and sovereign plan for each person begins long before birth. *See, e.g.*,

Jeremiah 1:4-5 ("Now the word of the Lord came to me, saying, 'Before I formed you in the womb I knew you, and before you were born I consecrated you; I appointed you a prophet to the nations.'"); *Psalm* 139:13-16 (noting that God "formed my inward parts . . . knitted me together in my mother's womb," and knew "the days that were formed for me, when as yet there was none of them"); *Luke* 1:39-44 (recounting that when Elizabeth, who was pregnant with John the Baptist, met Mary who would be the mother of Jesus, "the baby in [her] womb leaped for joy").

These and other Scriptural teachings can be distilled into four core principles undergirding the Baptist pro-life belief. First, God holds human life in high regard because "God created man in his own image." *Genesis* 1:27. Being made in the image of God stamps every human life with intrinsic worth and dignity. Second, Scripture teaches that a mother's womb contains a living human being created by God. Thus, abortion ends a human life. For example, in Luke 1:39-44, the inspired author of the Scripture describes the "baby" (Gr. βρεφος) in Mary's womb using the same word as is elsewhere used to describe an infant who has been born. The same scriptural passage affirms the personhood of the baby in the womb by ascribing to him the quintessentially human emotion of "joy." Third, God's word consistently condemns the killing of innocent human beings. *See, e.g., Proverbs* 6:16-17 (declaring that God "hates . . . hands that shed innocent blood."); *Psalm* 106 (describing how the "anger of the Lord was kindled" when his people "poured out innocent blood, the blood of their sons and daughters"). Finally, God calls his followers to "open your mouth for the mute, for the rights of all who are

destitute," *Proverbs* 31:8, and, as there is "opportunity[,] . . . do good to everyone," *Galatians* 6:10. No one is more mute or defenseless than the 1.2 million unborn slain annually in the United States through abortion.

In keeping with these Scriptural teachings, Southern Baptists stand firmly in support of the sanctity of human life, including the unborn. *See* The Baptist Faith and Message 2000 Art. XV ("We should speak on behalf of the unborn and contend for the sanctity of all human life from conception to natural death."); *id.* at Art. XVIII ("Children, from the moment of conception, are a blessing and heritage from the Lord."); *see also* SBC Resolution On Adoption and Orphan Care, 2009 ("Southern Baptists have articulated an unequivocal commitment to the sanctity of all human life, born and unborn."); SBC Resolution On Thirty Years of *Roe v. Wade*, 2003 ("The Bible affirms that the unborn baby is a person bearing the image of God from the moment of conception."); SBC Resolution on Sanctity of Human Life, 1991 ("Southern Baptists have historically affirmed biblical teaching regarding the sanctity of human life by adopting numerous pro-life resolutions at the national, state, and local levels."); SBC Resolution On Encouraging Laws Regulating Abortion, 1989 ("Southern Baptists have historically upheld the sanctity and worth of all human life, both born and preborn, as being created in the image of God."); SBC Resolution on Abortion, 1984 (noting that an unborn child "is a living individual human being").[4]

---

[4] Resolutions available at http://www.sbc.net/resolutions/1194/on-adoption-and-orphan-care, http://www.sbc.net/resolutions/11

In accordance with these beliefs about unborn human life, Southern Baptists have a firm and well-known theological opposition to abortion, and the Southern Baptist Convention has repeatedly expressed its opposition to abortion in the strongest terms. *See, e.g.*, SBC Resolution On Adoption and Orphan Care, 2009 ("The satanic powers and the ravages of sin have warred against infants and children from Pharaoh to Molech to Herod and, now, through the horrors of a divorce culture, an abortion industry, and the global plagues of disease, starvation, and warfare."); SBC Resolution On Planned Parenthood, 2008 ("Scripture speaks to the sanctity of human life in the womb [] and God's abhorrence of those who murder the innocent.") (citations omitted); SBC Resolution on Sanctity of Human Life, 1991 ("[W]e . . . affirm the biblical prohibition against the taking of unborn human life except to save the life of the mother; and . . . we call on all Southern Baptists to work for the adoption of pro-life legislation in their respective states which would expand protection for unborn babies."); SBC Resolution On Encouraging Laws Regulating Abortion, 1989 ("[T]he messengers to the annual meetings of the Southern Baptist Convention during the past decade have repeatedly reaffirmed their opposition to legalized abortion, except in cases where the mother's life is immediately threatened [and] we do reaffirm our opposition to legalized abortion."); SBC Resolution on Abortion, 1984

30/on-thirty-years-of-roe-v-wade, http://www.sbc.net/resolutions/619/resolution-on-sanctity-of-human-life, http://www.sbc.net/resolutions/23/resolution-on-encouraging-laws-regulating-abortion, and http://www.sbc.net/resolutions/21/resolution-on-abortion (links last visited August 7, 2015).

(characterizing abortion-on-demand as a "national sin").[5]

In addition, Southern Baptists have expressly opposed the use of abortion-inducing drugs such as the so-called morning-after pill because such drugs kill an unborn human person. *See, e.g.*, SBC Resolution on RU 486, 1994 ("RU 486, the French abortion pill, is a direct assault on the sacredness and value of unborn human life in that this drug kills an unborn child whose heart has already started to beat."); SBC Resolution on Sanctity of Human Life, 1991 ("[W]e oppose the testing, approval, distribution, and marketing in America of new drugs and technologies which will make the practice of abortion more convenient and more widespread.").[6]

In keeping with these Baptist beliefs and historic Protestant beliefs,[7] prominent Southern Baptist

---

[5] Resolutions available at http://www.sbc.net/resolutions/1194/on-adoption-and-orphan-care, http://www.sbc.net/resolutions/1191/on-planned-parenthood, http:// www.sbc.net/resolutions/619/resolution-on-sanctity-of-human-life, http://www. sbc.net/resolutions/23/resolution-on-encouraging-laws-regulating-abortion, and http://www.sbc.net/resolutions/21/resolution-on-abortion (links last visited August 7, 2015).

[6] Resolutions available at http://www.sbc.net/resolutions/25/resolution-on-ru-486-the-french-abortion-pill; http://www.sbc.net/resolutions/619/resolution-on-sanctity-of-human-life (links last visited August 7, 2015).

[7] Indeed, the Reformers denounced abortion as a grave moral evil. *See, e.g.*, Martin Luther, *Luther's Works, Vol. 4: Lectures on Genesis Chapters 21-25* at 304 (tr. Jaroslav Pelikan, 1999) ("How great, therefore, the wickedness of human nature is! How many girls there are who prevent conception and kill and expel tender fetuses, although procreation is the work of God!"); John Calvin, *Commentaries on the Last Four Books of Moses*, Vol. 3

theologians and ministers have and continue to decry the grave moral wrong of abortion. *See* R. Albert Mohler, Jr., *"I Feel Super Great About Having an Abortion"—The Culture of Death Goes Viral*, May 8, 2014; ERLC Letter to Congress on No Taxpayer Funding for Abortion Act, January 27, 2014; R. Albert Mohler, Jr., *So What if Abortion Ends a Life? Rare Candor from the Culture of Death*, February 1, 2013; R. Albert Mohler, Jr., *"Abortion is as American as Apple Pie"—The Culture of Death Finds a Voice*, January 20, 2012;[8] Carl F.H. Henry, *Has Democracy Had Its Day?* at 28-29 (1996) (commending those "who resisted the federal government's intrusion into the sphere of religious values, notably . . . the public funding of abortion"); Carl F.H. Henry, *Twighlight of a Great Civilization* at 34 (1988) ("[W]hen government engages in programs that violate Christian conscience, such as funding abortions, . . . bold protest is proper.").

These beliefs and obligations guide not only Southern Baptist ministers and individuals, but also instruct the policy and practice of all Southern Baptist ministries and entities. *See* SBC Resolution on Abortion, 1987 ("[W]e encourage all agencies and

---

at 51-52 (tr. Charles Bingham, 1852) ("[T]he foetus, though enclosed in the womb of its mother, is already a human being, and it is almost a monstrous crime to rob it of the life which it has not yet begun to enjoy.").

[8] *Available at* http://www.albertmohler.com/2014/05/08/i-feel-super-great-about-having-an-abortion-the-culture-of-death-goes-viral/; http://www.erlc.com/documents/pdf/20140127-ltr-house-ntffaa.pdf; http://www.albertmohler.com/2013/02/01/so-what-if-abortion-ends-a-life-rare-candor-from-the-culture-of-death/; http://www.albertmohler.com/2012/01/20/abortion-is-as-american-as-apple-pie-the-culture-of-death-finds-a-voice/ (links last visited August 7, 2015).

institutions of the SBC to use their resources and program ministries to promote the sanctity of human life."), *available at* http://www.sbc.net/resolutions/22/resolution-on-abortion (last visited August 7, 2015).

In light of the clear Southern Baptist conviction on the sanctity of life and the moral wrong of abortion, it is no surprise that Southern Baptist entities like the Petitioners refuse to provide abortion-inducing drugs either directly or indirectly by authorizing, obligating, or incentivizing their own health care providers to provide such drugs.

III. Christian doctrine and Southern Baptist teaching state it is a sin for a Christian to enable or aid another in doing what the Christian believes to be wrong.

As a result of the holistic scope of the Christian faith and the Southern Baptist theological opposition to abortion, the Petitioners, as a matter of doctrine and conscience, cannot distribute abortion-inducing drugs and devices either directly or indirectly by authorizing, obligating, or incentivizing their own third-party administrators to provide such drugs and devices to others. Christian doctrine, like the civil and criminal law of this nation, teaches that one who knowingly aids or abets another's wrongdoing has himself done wrong. *See, e.g.*, *Matthew* 18:6 ("[W]hoever causes one of these little ones who believe in me to sin, it would be better for him to have a great millstone fastened around his neck and to be drowned in the depth of the sea."); *Romans* 14:13-14 ("Therefore let us not pass judgment on one another any longer, but rather decide never to put a stumbling block or hindrance in the way of a brother" and thus cause them to sin); *1 Corinthians* 8:9-13

(warning Christians to take care not to be a "stumbling block" to others and noting that by "sinning against your brothers and wounding their conscience when it is weak, you sin against Christ"); *The Larger Catechism of the Westminster Assembly* 245 (1841) ("That what is forbidden or commanded to ourselves, we are bound, according to our places, to endeavour that it may be avoided or performed by others.").

This principle applies with particular force to situations in which a Christian's action or inaction involves the taking of life. *See, e.g.*, *The Large Catechism by Martin Luther* (1529), reprinted in *Triglot Concordia: The Symbolical Books of the Ev. Lutheran Church* (1921) ("So also, if you see any one innocently sentenced to death or in like distress, and do not save him, although you know ways and means to do so, you have killed him."); Thomas Vincent, *An Explanation of the Assembly's Shorter Catechism* 171-72 (1806) ("We are forbidden to kill . . . others, either directly . . . or indirectly, by doing any thing that tendeth thereunto. . . . We may be guilty of the murder of . . . others, indirectly, by doing any thing that tendeth to take away . . . others lives.").

Congress and the States' legislatures have long recognized that one's sincere religious beliefs may prevent him from approving, authorizing, or aiding another in something the believer considers to be wrong, even if the believer is not himself committing the underlying wrong. For example, Congress exempts religious conscientious objectors not only from combat roles but from participation "in any form" in war. 50 U.S.C. App. § 456(j); *Hanna v. Secretary of the Army*, 513 F.3d 4 (1st Cir. 2008) (upholding permanent injunction exempting Coptic

Christian physician from active duty because she could not perform her chosen profession in the military context without violating her deeply held religious beliefs). Also, physicians and hospitals with a religious objection to abortion are exempt not only from performing abortion but also from assisting, making their facilities available, or even making referrals for abortion. 42 U.S.C. § 300a-7; 42 U.S.C. § 238n. Similarly, "eleven states and the federal government have adopted some type of statute or regulation to ensure that individuals are not forced to participate in executions against their will." Mark L. Rienzi, *The Constitutional Right Not to Kill*, 62 Emory L.J. 121, 139 (2012).

The courts, like the legislatures, recognize that one's religious beliefs may prevent believers from any attenuated authorization or complicity in conduct they consider to be wrong. *See, e.g., Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1142 (10th Cir. 2013), *aff'd sub nom. Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) ("And the question here is not whether the reasonable observer would consider the plaintiffs complicit in an immoral act, but rather how the plaintiffs themselves measure their degree of complicity."); *Gilardi v. U.S. Dept. of Health and Human Servcs.*, 733 F.3d 1208, 1215 (D.C. Cir. 2013), *vacated on other grounds*, 134 S. Ct. 2902 (2014) (noting that "even attenuated participation may be construed as a sin") (citation omitted); *Thomas v. Anchorage Human Rights Comm'n*, 165 F.3d 692 (9th Cir. 1999), *vacated on other grounds*, 220 F.3d 1134 (9th Cir. 2000) (*en banc*) (recognizing a Christian landlord's sincere religious belief that unmarried cohabitation was sin merited exemption from state and local housing

laws); *Attorney Gen. v. Desilets*, 636 N.E.2d 233 (Mass. 1994) (same, under Massachusetts Constitution); *State by Cooper v. French*, 460 N.W.2d 2, 7 (Minn. 1990) (same, under Minnesota Constitution). Indeed, courts have previously recognized this concept in this very context. *See Hobby Lobby*, 723 F.3d at 1140 n.15 ("The assertion that life begins at conception is familiar in modern religious discourse . . . Moral culpability for enabling a third party's supposedly immoral act is likewise familiar.").

The statutory and judicial religious exemptions enumerated above are notable for several reasons. First, none of them make the applicability of the exemption dependent on whether the religiously motivated conduct involves "sacred" or seemingly "secular" conduct. *See, e.g., Desilets*, 636 N.E.2d at 238 ("The fact that the defendants' free exercise of religion claim arises in a commercial context . . . does not mean that their constitutional rights are not substantially burdened."). Second, they recognize that religious belief not only prevents believers from engaging directly in sin but also prevent any participation, authorization, or enabling of what they consider to be sin. *See* Rienzi, 62 Emory L.J. at 139 (noting that statutory exemptions from participating in capital punishment "protect the individual not only from direct involvement—such as personally administering a lethal injection or turning on the electric chair—but also less direct involvement such as preparing the individual and apparatus used, supervising other people who will do these things, or even attending the execution.") (citation omitted). Finally, many of these exemptions involve situations involving the taking of human life, recognizing that

to compel individuals to participate in what they believe to be an unjustified taking of life imposes a grievous burden on the exercise of their beliefs.

Here, like in the foregoing examples, the Petitioners' refusal to be complicit in wrongdoing is in no way undercut by the fact that Southern Baptists, like other Christians over the past two millennia, pay taxes that may ultimately be used to fund objectionable acts. The payment of taxes is distinguishable in several ways. First, Jesus expressly commanded his followers to do so—a command given to hearers who would have found many of Caesar's activities to be objectionable—while simultaneously recognizing that payment of taxes did not forfeit a believer's primary obligations to follow God's commands. *See Mark* 12:17 ("Jesus said to them, 'Render to Caesar the things that are Caesar's, and to God the things that are God's.'"). Second, the act of paying a tax does not itself require one citizen to intentionally, directly, and personally obligate another citizen to engage in known objectionable conduct. In contrast, the HHS mandate forces the Petitioners to sign and deliver a form with the purpose of expressly authorizing the provision of abortion-inducing drugs—drugs whose sole purpose and use is inherently morally objectionable and which otherwise would not be provided. Third, the vast majority of each tax dollar paid by Petitioners is spent on things that they do not find inherently morally objectionable, a fact that comports with the Scriptural recognition that a proper function of the state is to do good and punish evil. *See Romans* 13:3-7. Here, in contrast, the certain effect of participating in the mandate scheme is to authorize, obligate, or incentivize Petitioners' third-party administrators to

engage in a specific form of conduct Petitioners find morally objectionable.

In analogous contexts, courts have implicitly recognized a distinction between complicity in wrongdoing and the mere payment of taxes. For example, the Supreme Court has recognized that a pacifist has a legitimate moral objection to being forced to work in a factory making war goods. *See Thomas v. Review Bd. of Indiana Employment Sec. Div.*, 450 U.S. 707 (1981) The fact that Thomas also paid taxes that were used to support the war effort did not scuttle his argument that manufacturing weapons made him complicit in the war and thus violated his religious beliefs.

In sum, scriptural teaching and Southern Baptist doctrine state it is a sin for a Christian to enable or aid another in doing what the Christian believes to be wrong, and thus the Petitioners, as a matter of doctrine and conscience, cannot comply with the government's mandate to delegate to another the repugnant task of distributing abortion-inducing drugs and devices.

IV. Requiring Christians to choose between violating the Government's regulations or violating their sincerely held religious beliefs substantially burdens their exercise of religion.

The Religious Freedom Restoration Act of 1993 ("RFRA"), 42 U.S.C. §§ 2000bb *et seq.*, prohibits the federal government from substantially burdening "a person's exercise of religion," *id.* at § 2000bb-1(a), unless applying that burden is the "least restrictive means of furthering . . [a] compelling governmental interest," *id.* at § 2000bb-1(b). In enacting RFRA,

Congress sought to restore the compelling interest test for defenses to claims that a facially neutral law of general applicability "substantially burdens" the free exercise of religion—a test that had been abandoned by the Supreme Court in *Employment Division, Department of Human Resources v. Smith*, 494 U.S. 872 (1990). *See* 42 U.S.C. § 2000bb(b)(1) ("The purposes of this chapter are: (1) to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is *substantially burdened*.") (emphasis added). Thus, RFRA creates a statutory right to exemption from laws that substantially burden sincere religious beliefs, even if the law is neutral and generally applicable, unless the government can prove that "strict scrutiny" is met. *O'Bryan v. Bureau of Prisons*, 349 F.3d 399, 401 (7th Cir. 2003).

The existence of a substantial burden is most apparent when the government forces a person or group to "perform acts undeniably at odds with fundamental tenets of their religious beliefs." *Wisconsin v. Yoder*, 406 U.S. 205, 218 (1972) (finding that compulsory formal secondary education was an undue burden on the free exercise of Amish parents' religion). Further, a substantial burden can arise indirectly if the receipt of benefits is conditioned on the performance of conduct proscribed by a religious faith, or benefits are denied because of conduct required by a religious faith. *Thomas v. Review Bd. of Indiana Empl. Sec. Div.*, 450 U.S. 707, 717-18 (1981) (determining that a denial of unemployment benefits to an employee who had a religious objection to war was a burden on his religion).

As a threshold matter, the religious objection or conduct at issue must be both sincere and religious. *Hobby Lobby*, 723 F.3d at 1140. The religious belief is not, however, required to be central to the person's faith, 42 U.S.C. § 2000cc-5(7)(A), nor is it required to be a "correct" interpretation. *See United States v. Lee*, 455 U.S. 252, 257 (1982) ("Courts are not arbiters of scriptural interpretation."); *id.* at 261 n.12 ("It is not within 'the judicial function and judicial competence'" to decide the "proper interpretation" of religious beliefs) (quoting *Thomas*, 450 U.S. at 716).

Instead, a party must only show an "honest conviction" that the pressure from the government substantially conflicts with his religion. *Thomas*, 450 U.S. at 716. Rather than questioning the validity of the belief, the court undertaking the substantial burden analysis under RFRA should focus on the intensity of the coercion applied by the government, requiring that the restrictive law protect "interests of the highest order." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993).

Christian doctrine requires Christian individuals and entities to consistently conduct themselves in accordance with their beliefs. *See* Part I, *supra*. Furthermore, Christians should not be required to abandon the task to which they have been called by God solely because of governmental intrusion and penalties. *See* The Baptist Faith & Message 2000, Art. XVII ("Civil government being ordained by God, it is the duty of Christians to render loyal obedience thereto in all things not contrary to the revealed will of God. . . . The state has no right to impose penalties for religious opinions of any kind."), *available at* http://www.sbc.net/bfm2000/bfm2000.asp (last visited August 7, 2015). To force Southern Baptist entities

such as Petitioners to choose between paying crippling fines by conducting their ministries in accord with their religious tenets or sacrificing those core values in order to preserve the ministry is exactly the type of coercion the substantial burden test encompasses.

The Supreme Court has previously recognized that sincerely-held religious beliefs subject to government pressure at the workplace can result in a substantial burden on religion. *See Thomas*, 450 U.S. at 716 (finding a substantial burden existed when an employee, who had a religious belief against producing war materials, was denied unemployment benefits after quitting because of a transfer to a tank turret production factory); *Sherbert v. Verner*, 374 U.S. 398, 404 (1963) (holding the denial of unemployment benefits placed a substantial burden on a Seventh-day Adventist who quit her job after being forced to work on a Saturday).

Significantly, the government has recognized this substantial burden by establishing exemptions for other religious groups cornered into making this choice. *See* 45 C.F.R. § 147.131 (2013) (allowing HRSA to exempt religious employers from requirement to cover contraceptive services under group health plan); *see generally* 78 Fed. Reg. 39870 (July 2, 2013) ("[G]roup health plans established or maintained by certain religious employers (and group health insurance coverage provided in connection with such plans) are exempt from the otherwise applicable requirement to cover certain contraceptive services"). The inherent discrimination involved in the Government's recognition of exempt groups only compounds the burdensome nature of the fines imposed by the Government's regulations

on non-exempt groups that share the same religious views. *Sherbert*, 374 U.S. at 406 (noting a prohibition against requiring employees to work on Sunday compounds the unconstitutionality of forcing a Sabbatarian to work on Saturday).

In sum, the government's mandate substantially burden the religious exercise of Petitioners' Christian ministries by imposing draconian fines on them as a result of their acts that are specifically mandated by Christian doctrine.

CONCLUSION

For the foregoing reasons, *amici* respectfully request this Court grant the petition for a writ of certiorari and set the case for plenary review of whether centuries-old religious groups may practice their traditional beliefs free from intrusive State regulation.

Respectfully submitted,

Miles E. Coleman
Counsel of Record
Jay T. Thompson
NELSON MULLINS RILEY &
SCARBOROUGH, LLP
1320 Main Street
Columbia, SC 29201
miles.coleman@nelsonmullins.com
(803) 799-2000

Derek Gaubatz
INTERNATIONAL MISSION BOARD
3806 Monument Avenue
Richmond, VA 23230
Counsel for *Amici Curiae*

August 10, 2015